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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

15
16 J. DOE 1, et al.,

Case No. 4:22-cv-6823-JST

17 Individual and
18 Representative Plaintiffs,
v.
19 GITHUB, INC., et al.,
20 Defendants.

Consolidated with Case No. 4:22-cv-7074-JST

**DEFENDANTS GITHUB AND
MICROSOFT'S NOTICE OF MOTIONS
AND MOTIONS TO DISMISS PORTIONS
OF THE FIRST AMENDED COMPLAINT
IN CONSOLIDATED ACTIONS**

21 Date: September 14, 2023
22 Time: 2:00 p.m.
Courtroom: 6, 2d Floor
Judge: Hon. Jon S. Tigar

23 AND CONSOLIDATED ACTION

24
Amended Complaint Filed: June 8, 2023

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TABLE OF CONTENTS

1	TABLE OF AUTHORITIES	ii
2	NOTICE OF MOTIONS AND MOTIONS	1
3	MEMORANDUM OF POINTS AND AUTHORITIES	1
4	INTRODUCTION AND SUMMARY OF ISSUES.....	1
5	FACTUAL AND PROCEDURAL BACKGROUND.....	3
6	A. The Technology At Issue – According To The Amended Complaint.....	3
7	1. OpenAI Develops A Generative AI Tool Called Codex.....	3
8	2. GitHub Offers Copilot, A Code Completion Tool Based On Generative AI.	4
9	B. Prior Proceedings	5
10	C. Plaintiffs’ New Allegations.....	6
11	ARGUMENT	9
12	I. THE AMENDED COMPLAINT DOES NOT ESTABLISH ARTICLE III STANDING TO PURSUE CLAIMS FOR DAMAGES.....	9
13	A. Plaintiffs Cannot Manufacture Standing To Seek Damages.....	9
14	B. All Requests For Or Assertions Of Entitlement To Monetary Relief Should Be Dismissed.....	12
15	II. PLAINTIFFS’ DMCA CLAIMS FAIL BECAUSE PLAINTIFFS DO NOT ALLEGE REMOVAL OR ALTERATION OF CMI FROM IDENTICAL COPIES OF WORKS.	13
16	III. PLAINTIFFS’ TORT CLAIMS ARE PREEMPTED BY THE COPYRIGHT ACT.....	15
17	IV. THE TORT CLAIMS ARE DEFECTIVE FOR OTHER REASONS AS WELL.....	18
18	A. Plaintiffs Fail To Identify Applicable State Law For Their Common Law Claims.	18
19	B. Plaintiffs Fail To State A Claim For Intentional Or Negligent Interference With Economic Relations.....	18
20	C. Plaintiffs’ New Attempt At An Unjust Enrichment Claim Does Not Cure Its Defects.....	20
21	D. Plaintiffs Have Not Alleged The Deprivation Of Money Or Property Required To Make A UCL Claim.....	21
22	E. Plaintiffs’ Negligence Claim Fails To Identify Any Legal Duty Sounding In Tort.	21
23	CONCLUSION	23
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Apple Comput., Inc. v. Microsoft Corp.</i> , 35 F.3d 1435 (9th Cir. 1994).....	2
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	20, 21
<i>In re Bang Energy Drink Mktg. Litig.</i> , No. 18-cv-05758, 2020 WL 4458916 (N.D. Cal. Feb. 6, 2020)	20
<i>Buchholz v. Meyer Njus Tanick, PA</i> , 946 F.3d 855 (6th Cir. 2020).....	10
<i>Clapper v. Amnesty Int'l. USA</i> , 568 U.S. 398 (2013).....	10
<i>Crafty Prods., Inc. v. Fuqing Sanxing Crafts Co.</i> , 839 F. App'x 95 (9th Cir. 2020)	16
<i>Crown Imports, LLC v. Super. Ct.</i> , 223 Cal. App. 4th 1395 (2014).....	18
<i>Dastar Corp. v. Twentieth Century Fox Film Corp.</i> , 539 U.S. 23 (2003).....	17
<i>Design Basics, LLC v. WK Olson Architects, Inc.</i> , No. 17 C 7432, 2019 WL 527535 (N.D. Ill. Feb. 11, 2019)	13
<i>ESG Cap. Partners, LP v. Stratos</i> , 828 F.3d 1023 (9th Cir. 2016).....	20
<i>Faulkner Press, L.L.C. v. Class Notes, L.L.C.</i> , 756 F. Supp. 2d 1352 (N.D. Fla. 2010).....	13
<i>Foley v. Interactive Data Corp.</i> , 47 Cal. 3d 654 (1988)	22
<i>Frost-Tsiji Architects v. Highway Inn, Inc.</i> , No. CIV. 13-00496, 2015 WL 263556 (D. Haw. Jan. 21, 2015)	13
<i>Fry v. Ancestry.com Operations Inc.</i> , No. 22-CV-140 JD, 2023 WL 2631387 (N.D. Ind. Mar. 24, 2023)	10
<i>GBTI, Inc. v. Ins. Co. of Pa.</i> , No. CV F 09-1173, 2009 WL 2365409 (E.D. Cal. July 29, 2009)	12

1	<i>Google LLC v. Oracle Am., Inc.</i> , 141 S. Ct. 1183 (2021).....	2, 15
2	<i>Harper & Row Publishers, Inc. v. Nation Enters.</i> , 723 F.2d 195 (2d Cir. 1983).....	16
3		
4	<i>Hawkins v. Comparet-Cassani</i> , 251 F.3d 1230 (9th Cir. 2001).....	12
5		
6	<i>Korea Supply Co. v. Lockheed Martin Corp.</i> , 29 Cal. 4th 1134 (2003)	20
7		
8	<i>Kelly v. Arriba Soft Corp.</i> , 77 F. Supp. 2d 1116 (C.D. Cal. 1999).....	13
9		
10	<i>Ixchel Pharma, LLC v. Biogen, Inc.</i> , 9 Cal. 5th 1130 (2020)	18, 19
11		
12	<i>Kodadek v. MTV Networks, Inc.</i> , 152 F.3d 1209 (9th Cir. 1998).....	17
13		
14	<i>Kwikset Corp. v. Super. Ct.</i> , 51 Cal. 4th 310 (2011)	21
15		
16	<i>Langan v. United Servs. Auto. Ass'n</i> , 69 F. Supp. 3d 965 (N.D. Cal. 2014)	21
17		
18	<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	10
19		
20	<i>Maloney v. T3Media, Inc.</i> , 853 F.3d 1004 (9th Cir. 2017).....	15, 17
21		
22	<i>Montz v. Pilgrim Films & Television, Inc.</i> , 649 F.3d 975 (9th Cir. 2011) (en banc).....	16
23		
24	<i>Newman-Green, Inc. v. Alfonzo-Larrain</i> , 490 U.S. 826 (1989)	11
25		
26	<i>O'Connor v. Uber Techs., Inc.</i> , 58 F. Supp. 3d 989 (N.D. Cal. 2014)	19
27		
28	<i>Orchard Supply Hardware LLC v. Home Depot USA, Inc.</i> , 967 F. Supp. 2d 1347 (N.D. Cal. 2013)	23
26	<i>Rhynes v. Stryker Corp.</i> , No. 10-5619 SC, 2011 WL 2149095 (N.D. Cal. May 31, 2011)	12
27		
28	<i>Rosen v. Uber Techs., Inc.</i> , 164 F. Supp. 3d 1165 (N.D. Cal. 2016)	18, 19

1	<i>Sony Comput. Ent., Inc. v. Connectix Corp.</i> , 203 F.3d 596 (9th Cir. 2000).....	2
2	<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330 (2016).....	5
4	<i>Vermillion v. Corrections Corp. of Am.</i> , No. CV F 08-1069, 2008 WL 4058063 (E.D. Cal. Aug. 28, 2008)	12
6	<i>West v. City & Cnty. of S.F.</i> , No. 21-cv-02370, 2022 WL 1556415 (N.D. Cal. May 17, 2022).....	23
7	<i>Westside Ctr. Assocs. v. Safeway Stores 23, Inc.</i> , 42 Cal. App. 4th 507 (1996).....	18, 19
9	<i>Wilbur v. Locke</i> , 423 F.3d 1101 (9th Cir. 2005).....	11
10		
11	Statutes	
12	Copyright Act, 17 U.S.C. §§ 101, <i>et seq.</i>	
13	§ 102	15
14	§ 103.....	15
15	§ 106.....	15, 17
16	§ 301.....	3, 6, 15, 16, 7
17	§ 301(a)	15
18	§ 1202(a)	6
19	§ 1202(b)(1)	6, 13
20	§ 1202(b).....	<i>passim</i>
21	§ 1202(b)(3)	6, 13
22	§ 1202(c)	14
23	Cal. Bus. & Prof. Code §§ 17200, <i>et seq</i>	21
24	California Civil Code	
25	§ 3294.....	12
26	§ 3294(a)	12
27	§ 3294(c)	12
28		
29	Other Authorities	
30	Federal Rules of Civil Procedure	
31	Rule 8	5
32	Rule 9	5
33	Rule 10	5
34	Rule 12(b)(1).....	5, 9
35	Rule 12(b)(6).....	5, 6, 12
36	S. Rep. No. 105-190 (1998)	14

NOTICE OF MOTIONS AND MOTIONS

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT on September 14, 2023 at 2:00 p.m., before the
4 Honorable Jon S. Tigar seated in Courtroom 6 of the United States Courthouse at Oakland,
5 California, with appearances to be made by Zoom videoconference unless otherwise ordered by
6 the Court, Defendants GitHub, Inc. (“GitHub”) and Microsoft Corporation (“Microsoft”) will,
7 and hereby do, move, pursuant to Federal Rules of Civil Procedure, 12(b)(1) and 12(b)(6) to
8 dismiss portions of the operative Amended Complaint in these consolidated actions, filed as ECF
9 No. 98 in the 4:22-cv-6823 action (the “Amended Complaint” or “Am. Compl.”), as to both
10 GitHub and Microsoft.

11 The grounds for the Motions are as follows. First, insofar as Plaintiffs attempt to plead
12 any claims for damages in the Amended Complaint, those claims should be dismissed pursuant to
13 Rule 12(b)(1) because Plaintiffs fail to allege that they suffered any actual injury at the hands of
14 either GitHub or Microsoft. Accordingly, all requests for or assertions of entitlement to monetary
15 relief should be dismissed from the case, and Plaintiffs' requests for punitive damages should be
16 independently dismissed pursuant to Rule 12(b)(6) because Plaintiffs fail to plead entitlement to
17 such relief. Second, Counts 1, 4, 5, 6, 7, and 8 of the Amended Complaint should be dismissed
18 pursuant to Rule 12(b)(6) because they are either (a) legally foreclosed, (b) deficient because
19 factual allegations required to support necessary elements are missing or implausible, or (c) both.

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION AND SUMMARY OF ISSUES**

The central premise of Plaintiffs' case is that GitHub's Copilot AI tool, in response to user input, is capable of generating coding suggestions that are reproductions of Plaintiffs' code. But Plaintiffs' initial Complaint had a critical defect. As this Court found, Plaintiffs failed to allege that Copilot had ever actually generated any suggestion reproducing *their* code, leaving Plaintiffs uninjured and therefore without standing to pursue damages. Lacking real-life instances of harm, Plaintiffs now try to manufacture some. In their Amended Complaint, Plaintiffs set about to create "a few examples of Plaintiffs' code being reproduced," Am. Compl. ¶ 127, by themselves mechanically entering their own code into a code editor until Copilot generated a suggested completion that looked like (but still differed from) Plaintiffs'. Far from fixing the defect, however, Plaintiffs' contrived examples simply confirm how implausible it is that Copilot has ever actually generated a copy of Plaintiffs' code.

The problem with Plaintiffs' examples is that there is nothing in the Amended Complaint to suggest that the prompts Plaintiffs employed would ever actually happen in the real world. In one example, Plaintiffs precisely transcribed 22 lines of a function that sets up a game board—including the name of the game being set up, layout of the board, and number and type of pieces—before Copilot suggested an 18-line completion that was not even an exact copy (more on that in a moment). It is inconceivable that an actual user would somehow precisely type in 22 lines of that code by chance or accident while working on her own coding project. That is why Plaintiffs do not even attempt to allege that any real-life user would or could come anywhere close to entering prompts anything like those that yielded Plaintiffs' examples. The fact that Plaintiffs had to go to such unrealistic lengths to manufacture even the few examples they include in the Amended Complaint only reaffirms how unlikely it is that Plaintiffs have actually suffered any injury. Plaintiffs' attempt to manufacture standing fails. *Infra* § I.

Plaintiffs' examples also undermine their theory on the merits—and here it is not the prompts, but the outputs that are the problem. Plaintiffs continue to allege that Copilot cannot really code "the way a human would," Am. Compl. ¶ 58, and instead is just "reproducing," Am.

1 Compl. ¶ 77. But Plaintiffs were unable to manipulate Copilot into emitting a “verbatim copy of
 2 copyrighted code.” Am. Compl. ¶ 78. Their examples all contain variations from their code, just
 3 as you might expect from an AI model that has learned common functional concepts across a
 4 universe of code, then generated context-dependent suggestions that incorporate that learning.
 5 Indeed, one example Plaintiffs tout is nothing more than a list of known chemical compounds in
 6 the same order as a list widely available on the internet—and even that is not a verbatim
 7 reproduction of Plaintiffs’ version. This is all of little surprise, since Plaintiffs elsewhere admit
 8 that the way Copilot actually works is by discerning “statistically significant patterns.” Am.
 9 Compl. ¶ 85. Because Plaintiffs do not allege that any of *their* code is prevalent enough to be
 10 detected as a pattern in the training set, it is implausible that Copilot would ever output that
 11 code—even assuming, as necessary at this stage, that “about 1% of the time” Copilot may more
 12 precisely reproduce a snippet of *someone else*’s oft-repeated code, Am. Compl. ¶ 94.

13 That is why Plaintiffs are now forced to concede that, even in the tiny universe of
 14 contrived Copilot outputs they created, “more often” those outputs *differ* from their code. Am.
 15 Compl. ¶ 96. And to accommodate this reality, the Amended Complaint vastly expands their
 16 legal theory to reach not just actual reproductions, but also “functionally equivalent” code
 17 suggestions. Am. Compl. ¶ 103. But it is beyond dispute that copyright protection does not
 18 extend to the functionality (as opposed to the expression) of the underlying code. *See Sony*
 19 *Comput. Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 599 (9th Cir. 2000); *Apple Comput., Inc. v.*
 20 *Microsoft Corp.*, 35 F.3d 1435, 1444-45 (9th Cir. 1994); *cf. Google LLC v. Oracle Am., Inc.*, 141
 21 S. Ct. 1183, 1197-1200 (2021). So Plaintiffs’ new reliance on variations with alleged functional
 22 equivalency does not work for their claims under § 1202(b). While GitHub and Microsoft do not
 23 re-raise here the arguments this Court previously addressed with respect to Plaintiffs’ § 1202(b)
 24 claims, this Court did not expressly resolve whether Plaintiffs’ failure to allege that CMI was
 25 removed from identical copies meets the statutory requirement that the resulting infringement
 26 concern “copies … of a work,” a requirement Plaintiffs’ new theory could never satisfy. The
 27 Amended Complaint’s new reliance on algorithmic similarities underscores the need for this
 28 Court to reach the “copies” limitation of § 1202(b). *Infra* § II.

1 Finally, Plaintiffs' Amended Complaint includes one more expansion worthy of note.
2 Previously, the Court was skeptical whether the original Complaint was meant to premise liability
3 merely on the training of machine learning models, rather than on outputs. Plaintiffs now
4 advance two claims—unjust enrichment and negligence—that clearly attack training alone as
5 purportedly unlawful: “Defendants have unjustly utilized access to Licensed Materials hosted on
6 GitHub to create Codex and Copilot.” Am. Compl. ¶ 269. These claims, as well as all of
7 Plaintiffs’ other tort claims are still defective. Each is based on either the alleged reproduction or
8 distribution of code, or use of code to prepare a derivative work, and is therefore preempted by
9 § 301 of the Copyright Act. *Infra* § III. And each has additional defects as well. *Infra* § IV.

FACTUAL AND PROCEDURAL BACKGROUND

11 A. **The Technology At Issue – According To The Amended Complaint.**

1. OpenAI Develops A Generative AI Tool Called Codex.

13 OpenAI is a nonprofit organization that develops machine learning models, also referred
14 to as “Artificial Intelligence.” Am. Compl. ¶¶ 2, 167, 169. Such models are typically trained
15 through exposure to a corpus of material called “training data.” Am. Compl. ¶ 85. The patterns
16 discerned from the set of training data become part of the model, which can then generate
17 answers based upon those patterns in response to user prompts. Am. Compl. ¶ 85; *see* Am.
18 Compl. ¶ 56.

19 The model at issue in this case is called Codex. Codex is a generative AI model trained
20 on publicly available computer source code. Am. Compl. ¶¶ 56, 176. The model embodies
21 “inferred … statistical patterns governing the structure of code,” Am. Compl. ¶ 56, which it has
22 discerned from the training data based on “a complex probabilistic process.” Am. Compl. ¶ 83.
23 It is thus capable, in response to a prompt, of “predic[ting] … the most likely [coding] solution.”
24 Am. Compl. ¶ 83. “[E]ssentially [it] returns the solution it has found in the most [coding]
25 projects when those projects are somehow weighted to adjust for whatever variables [the model]
26 ha[s] identified as relevant.” Am. Compl. ¶ 83.

27 Generative AI models are capable of “simulat[ing] human reasoning or inference,”
28 engaging in the same sort of pattern recognition, synthesis, and prediction we do. Am. Compl.

1 ¶ 2. AI models like Codex also enable statistical analysis and prediction vastly more powerful,
 2 efficient, and sensitive than what the human brain can accomplish. Am. Compl. ¶ 85. At the
 3 same time, Codex “does not understand the meaning of code,” Am. Compl. ¶ 58, nor its
 4 “semantics and context the way humans do,” Am. Compl. ¶ 85. Codex thus offers both the
 5 ingenious and the mundane, a powerful tool of invention for humans who supply the insight to
 6 direct its range of performance.

7 **2. GitHub Offers Copilot, A Code Completion Tool Based On Generative AI.**

8 GitHub Copilot is a programming assistant. Am. Compl. ¶ 8. The Amended Complaint
 9 alleges that Copilot “uses the OpenAI Codex to suggest code and entire functions in real-time” to
 10 software developers. Am. Compl. ¶ 51. To use Copilot, a GitHub user installs it “as an extension
 11 to various code editors, including Microsoft’s Visual Studio and VS Code.” Am. Compl. ¶ 71.
 12 “As the user types [code] into the editor,” Copilot treats the user’s input as a prompt, generating
 13 suggestions for code that may be appropriate for the developer’s purposes. Am. Compl. ¶ 71.
 14 Copilot is a subscription tool available to GitHub users for \$10 per month or \$100 per year. Am.
 15 Compl. ¶ 8.

16 Plaintiffs allege that the generative AI model that powers Copilot was trained on billions
 17 of lines of code that GitHub users stored in public GitHub repositories. *See* Am. Compl. ¶¶ 87,
 18 186. When GitHub users put their code on GitHub, they choose whether to make the code
 19 repositories private or public. Am. Compl. ¶ 160. Users who set their repositories “to be viewed
 20 publicly … grant each User of GitHub a nonexclusive, worldwide license to use, display, and
 21 perform Your Content through the GitHub Service and to reproduce Your Content solely on
 22 GitHub as permitted through GitHub’s functionality.” Am. Compl. Ex. 1 at 27 (GitHub Terms of
 23 Service (“TOS”) at 7). Every user agrees to GitHub’s TOS, which include a “License Grant” to
 24 GitHub to “store, archive, parse, and display … and make incidental copies” as well as “parse it
 25 into a search index or otherwise analyze it” and “share” the content in public repositories with
 26 other users. Am. Compl. Ex. 1 at 26-27 (GitHub TOS at 6-7). And users can also select from a
 27 range of preset open source licenses to apply to the code published in their various GitHub
 28 repositories, apply their own individual licenses, or select none at all. Am. Compl. ¶ 38 n.4 &

1 Appx. A.

2 Any GitHub user thus appreciates that code placed in a public repository is genuinely
 3 public. Anyone is free to examine, learn from, and understand that code, as well as repurpose it
 4 in various ways. And, consistent with this open source ethic, neither GitHub's TOS nor any of
 5 the common open source licenses prohibit either humans or computers from reading and learning
 6 from publicly available code. *See* Am. Compl. ¶ 38 n.4 & Appx. A.

7 **B. Prior Proceedings.**

8 In the initial Complaint, Plaintiffs raised twelve claims against Defendants. Compl., Doe
 9 3 v. GitHub, Inc., No. 22-cv-7074-JST (N.D. Cal. Nov. 10, 2022), ECF No. 1. GitHub and
 10 Microsoft moved to dismiss the entirety of the initial operative complaint pursuant to Federal
 11 Rules of Civil Procedure 8, 9, 10, 12(b)(1), and 12(b)(6). Mots. to Dismiss Operative Compl. in
 12 Consol. Actions, ECF No. 50.

13 This Court granted in part and denied in part GitHub and Microsoft's motions to dismiss.
 14 ECF No. 95. On standing, this Court held that Plaintiffs "failed to establish an injury-in-fact
 15 sufficient to confer standing for their claims for damages based on injury to property rights." *Id.*
 16 at 10. It recognized, *id.* at 6, that "at the pleading stage, the plaintiff must 'clearly ... allege facts
 17 demonstrating each element'" of standing—(1) a personal injury in fact; (2) that the injury was
 18 likely caused by the defendant, and (3) that the injury would likely be redressed by judicial relief.
 19 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518
 20 (1975)). And it found that Plaintiffs had failed to demonstrate that "they themselves" had
 21 suffered injury from "Copilot reproduc[ing] Plaintiffs' code as output with missing or incorrect
 22 attribution, copyright notices, and license terms." Order 8, ECF No. 95. Plaintiffs therefore
 23 lacked standing to pursue retrospective relief (*i.e.*, damages). This Court also held that Plaintiffs
 24 failed to allege facts demonstrating an injury-in-fact sufficient to confer standing for their
 25 privacy-based claims. *Id.* at 7.

26 Nevertheless, this Court held that "Plaintiffs plausibly allege that there is at least a
 27 substantial risk that Defendants' programs will produce Plaintiffs' licensed code as output," and
 28 that this risk "may support standing for injunctive relief." *Id.* at 9. The Court noted, however,

1 that “Plaintiffs do not allege they were injured by Defendants’ use of licensed code as training
 2 data[.]” *Id.* at 8 n.7.

3 On the merits, this Court dismissed Plaintiffs’ claims for violation of § 1202(a) of the
 4 DMCA, tortious interference, fraud, false designation of origin, and violation of the CCPA for
 5 failure to state a claim under Rule 12(b)(6), with leave to amend. *Id.* at 16. It further dismissed
 6 the unjust enrichment claim as preempted by the Copyright Act, with leave to amend. *Id.* at 17-
 7 18. As to Plaintiffs’ § 1202(b) claim, this Court ruled that Plaintiffs pled sufficient facts to
 8 support a reasonable inference that Defendants intentionally designed the programs to remove
 9 CMI from any licensed code they reproduce as output, *id.* at 19-21, but did not address GitHub
 10 and Microsoft’s argument that the § 1202(b) claim fails because the Complaint did not allege
 11 CMI removal from an “identical copy of the work.” *See* Mots. to Dismiss 13-14, ECF No. 50.

12 This Court denied Defendants’ motions to dismiss the breach of contract claim, Order at
 13 22, ECF No. 95. It then dismissed the UCL claims to the extent the predicate claims had been
 14 dismissed, with leave to amend, *id.* at 22-23, and it further dismissed the UCL claims predicated
 15 on violations of § 1202(b)(1) and (b)(3) of the DMCA, also with leave to amend, *id.* at 23. The
 16 Court dismissed the civil conspiracy and declaratory relief counts with prejudice. *Id.* at 24.

17 **C. Plaintiffs’ New Allegations.**

18 In their Amended Complaint, Plaintiffs have joined a fifth J. Doe GitHub user as a new
 19 Plaintiff and alleged eight claims for relief. Am. Compl. ¶¶ 19-23. The allegations underlying
 20 Plaintiffs’ claims under § 1202(b)(1) and (3), Am. Compl. ¶¶ 183-213 (Count 1), and for breach
 21 of open source licenses, Am. Compl. ¶¶ 214-29 (Count 2), are largely unchanged from the initial
 22 Complaint. Plaintiffs also now include claims for breach of contract for selling licensed materials
 23 in violation of GitHub’s policies, Am. Compl. ¶¶ 230-40 (Count 3); intentional interference with
 24 prospective economic relations, Am. Compl. ¶¶ 241-53 (Count 4); negligent interference with
 25 prospective economic relations, Am. Compl. ¶¶ 254-65 (Count 5); a modified unjust enrichment
 26 claim, Am. Compl. ¶¶ 266-74 (Count 6); a modified unfair competition claim, Am. Compl.
 27 ¶¶ 275-81 (Count 7); and a new negligence claim, Am. Compl. ¶¶ 282-89 (Count 8).

28 In support of these claims, Plaintiffs continue to allege that they “published Licensed

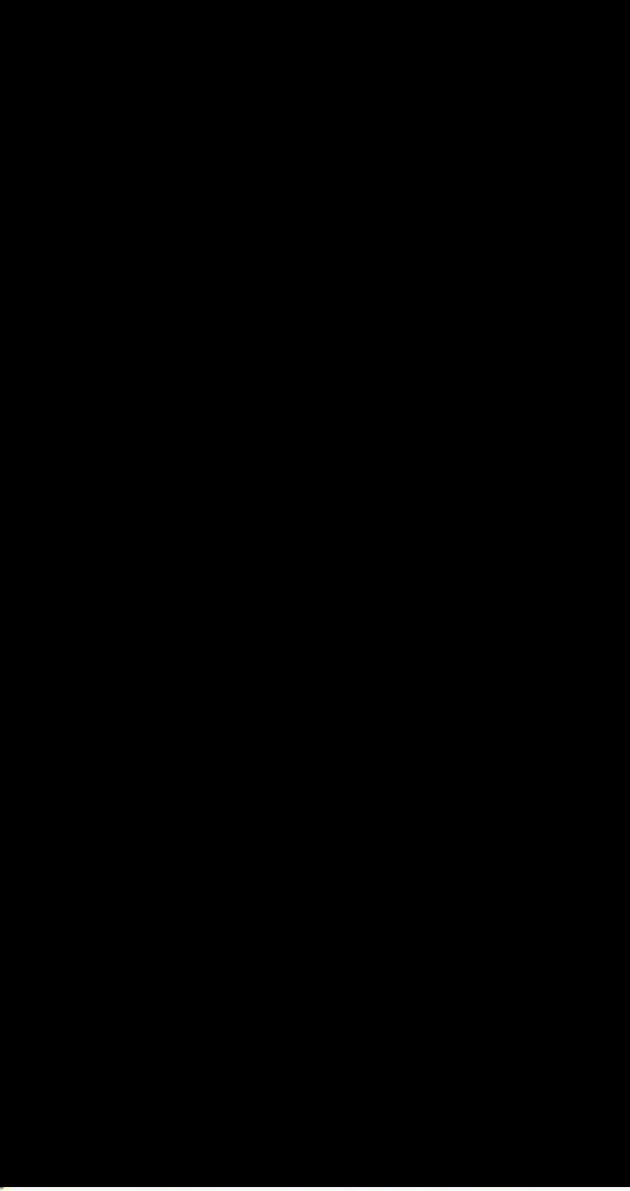
1 Materials they owned a copyright interest in to at least one GitHub repository under one of the
 2 Suggested licenses.” Am. Compl. ¶¶ 19-23. Plaintiffs allege that because Copilot was trained on
 3 public GitHub repositories, they can be “reasonably certain” their Licensed Materials were
 4 “ingested by Copilot and [are] sometimes returned to users as Output.” Am. Compl. ¶ 97.

5 New to the Amended Complaint, however, is Plaintiffs’ acknowledgement that “more
 6 often” than not, a snippet reproducing Plaintiffs code are snippets with “variations” from existing
 7 code. Am. Compl. ¶ 96. Three of the Plaintiffs also allege, with respect to code in their
 8 repositories, that they were able to “prompt[] Copilot” to “emit[]” their own Licensed Materials.
 9 Am. Compl. ¶¶ 98, 100, 103, 110, 123, 125, 127-128.

10 In the first example, Plaintiffs prompted Copilot with a Java *enum* keyword, which is used
 11 to represent (enumerate) a list of constants. Am. Compl. § 101. The prompt also contained the
 12 name for the *enum* as [REDACTED] followed by a line of code reflecting the specific format in
 13 which the constants would be listed—namely, starting with the name of the [REDACTED]
 14 [REDACTED].” Based on this
 15 information, Copilot suggested the remaining [REDACTED] in the same format—
 16 in the same order as Plaintiffs’ own code, but also in the same order as a list widely available on
 17 the internet. *Compare* Am. Compl. ¶¶ 100-04 with [http://en.wikipedia.org/wiki/\[REDACTED\]](http://en.wikipedia.org/wiki/[REDACTED]).

19 The other three examples make clear that Plaintiffs ventured far outside any ordinary use
 20 of Copilot to manufacture them, and even then failed to get Copilot to produce an actual copy. In
 21 one example, Plaintiffs entered, character for character, 22 lines of Doe 1’s code to yield a
 22 suggested output of 18 additional lines of code, which Plaintiffs nonetheless concede “is not an
 23 exact match for Doe 1’s code.” Am. Compl. ¶ 108. Plaintiffs characterize these differences as “a
 24 modification *based on a copy* of Doe 1’s code,” Am. Comp. ¶ 108 (emphasis added)—an
 25 insinuation with no supporting allegation. But in any event, a comparison of Plaintiffs’ code
 26 against Copilot’s output speaks for itself, demonstrating extensive differences between the two:
 27
 28

1 Original code:

A large black rectangular redaction box covers the text from line 2 to line 20 of the original code. The box is bounded by a thin yellow border on the left and right sides, and a thin grey border on the top and bottom. The lines are numbered from 1 to 21 on the left side of the redaction.

12 Output:

A large black rectangular redaction box covers the text of the output. The box is bounded by a thin yellow border on the left and right sides, and a thin grey border on the top and bottom. The lines are numbered from 1 to 12 on the left side of the redaction.

22 Am. Compl. ¶¶ 106-07.

23 The same is true of the remaining two examples. Am. Compl. ¶¶ 113-126. Plaintiffs offer
24 no example of a verbatim copy of code.25 Although most of Plaintiffs' claims are focused on the same output-without-attribution
26 theory Plaintiffs advanced in their initial Complaint, their claims for unjust enrichment and
27 negligence are based on the training of Copilot itself. See Am. Compl. ¶ 269 ("Defendants have
28 unjustly utilized access to Licensed Materials hosted on GitHub to create Codex and Copilot.");

1 *id.* ¶ 271 (“Plaintiffs did not consent to the unauthorized use of their Licensed Materials to train
 2 Codex and Copilot.”); *id.* ¶ 284 (“Defendants breached their duties by … engineering, designing,
 3 maintaining, and controlling systems—including Codex and Copilot—which are trained on
 4 Plaintiffs’ and Class members’ Licensed materials without their authorization.”). Plaintiffs allege
 5 that this training constitutes the creation of a “Derivative Work.” Am. Compl. ¶ 194 n.34.

6 **ARGUMENT**

7 **I. THE AMENDED COMPLAINT DOES NOT ESTABLISH ARTICLE III
 8 STANDING TO PURSUE CLAIMS FOR DAMAGES.**

9 In their Amended Complaint, Plaintiffs attempt to manufacture the standing to seek
 10 damages that this Court found lacking in the initial Complaint. Plaintiffs added a new Plaintiff
 11 who alleges that they were able to generate a copy of their code (after inputting many lines of
 12 their own code as a prompt), and added allegations from two other Plaintiffs claiming Copilot
 13 outputs that look like their code. Am. Compl. ¶¶ 100-28. Plaintiffs also attempt to predicate their
 14 claims for unjust enrichment and negligence solely on the alleged use of code in Plaintiffs’
 15 repositories to train Codex and Copilot, seemingly suggesting that training *itself* causes them
 16 injury. Am. Compl. ¶¶ 269, 284. Each of these artificial attempts to generate standing to pursue
 17 monetary damages fails, requiring dismissal of any request for damages under Rule 12(b)(1).

18 **A. Plaintiffs Cannot Manufacture Standing To Seek Damages.**

19 *Self-inflicted “injury” cannot confer standing.* Plaintiffs are still unable to plead facts
 20 plausibly suggesting that Copilot has ever generated a copy of Plaintiffs’ code when Copilot is
 21 prompted by normal use, rather than to generate litigation-focused outputs. None of their code is
 22 alleged to be popular or repeated elsewhere, nor well-suited to any purpose any other user may
 23 hope to satisfy when working on a coding project using Copilot. Plaintiffs’ theory of injury thus
 24 continues to rest on the bare notion that code in their repositories went *into* Copilot via training,
 25 so it could conceivably come *out of* Copilot, too.

26 Plaintiffs try to make this bare possibility more concrete by including several examples
 27 that they “have been able to generate” by entering prompts into Copilot. Am. Compl. ¶ 128. If
 28 Plaintiffs mean to suggest that these outputs themselves have injured them, that is a non-starter.

1 Plaintiffs may not “manufacture standing merely by inflicting harm on themselves.” *Clapper v.*
 2 *Amnesty Int’l. USA*, 568 U.S. 398, 416 (2013). Such self-inflicted injuries have a traceability
 3 problem—“[a] self-inflicted injury, by definition, is not traceable to anyone but the plaintiff.”
 4 *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866-67 (6th Cir. 2020) (collecting authorities).
 5 As one court put it in the context of a claim about misappropriation of the plaintiff’s likeness,
 6 “[i]t is silly to complain at length that one is devastated by the *unauthorized* use of his yearbook
 7 photo to sell a product where *he orchestrated the use* and the injury may not have occurred but
 8 for his initiative.” *Fry v. Ancestry.com Operations Inc.*, No. 22-CV-140 JD, 2023 WL 2631387,
 9 at *5 (N.D. Ind. Mar. 24, 2023) (emphases in original). So it is here.

10 Nor does including these examples in the Amended Complaint raise an inference that
 11 Copilot has elsewhere generated copies of code in the course of ordinary use by developers other
 12 than Plaintiffs. Quite the opposite: the lengths Plaintiffs and their counsel seemingly had to go to
 13 in order to conjure the four examples in the Amended Complaint weigh strongly against such an
 14 inference. Take the examples pertaining to Doe 5, the only Plaintiff who has not already been
 15 ruled to lack damages standing. The Amended Complaint alleges that by “prompt[ing]” Copilot
 16 with the first *several hundred* characters of code *precisely* as it appears in Doe 5’s coding project
 17 on GitHub, Plaintiffs were able to get Copilot to output code that completes the function that
 18 Plaintiffs asked Copilot to write in a way that is similar, but not identical, to how that particular
 19 Doe coded it. Am. Compl. ¶¶ 121-26.

20 It is impossible that any ordinary user would prompt Copilot with a precise replica of long
 21 portions of Plaintiffs’ code without deliberately transcribing it the way Plaintiffs did. Plaintiffs
 22 certainly do not allege that any of these prompts could ever actually occur. In any event, it is
 23 Plaintiffs’ burden to establish standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992),
 24 and so it is Plaintiffs’ job to show that the examples in their Amended Complaint are somehow
 25 exemplary of something that actually could have happened in real life. They have still not
 26 identified any prompt an ordinary user of Copilot would ever be likely to use that would generate
 27 a copy of code in their repositories. They therefore continue to lack standing to pursue damages.

28 ***Standing cannot be predicated on events that post-date the filing of suit.*** For Does 1 and

1 2, Plaintiffs' attempt to newly manufacture standing by including examples fails for another
 2 reason: “[S]tanding is determined as of the date of the filing of the complaint. The party
 3 invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the
 4 complaint to establish its standing.”” *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005)
 5 (alteration adopted), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S.
 6 413 (2010). Plaintiffs were all adjudged to lack standing to pursue damages based on the facts
 7 alleged in the initial Complaint. The only additional facts in the Amended Complaint that even
 8 conceivably go to Plaintiffs' claimed injury are the artificially manufactured examples, all of
 9 which appear to have been created after this Court dismissed Plaintiffs' damages claims. A
 10 plaintiff may not belatedly amend the jurisdictional facts to generate standing where none was
 11 present at the time the Complaint was filed. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490
 12 U.S. 826, 831 (1989).

13 ***Plaintiffs identify no cognizable injury from training.*** In its ruling on the prior motions
 14 to dismiss, this Court noted Plaintiffs' “suggest[ion] [that] they were also injured by Defendant's
 15 use of Plaintiffs' licensed code as training data.” Order 8 n.7, ECF No. 95. But it found that
 16 Plaintiffs had failed to “describe such an injury.” *Id.* And indeed, at the hearing on Defendants'
 17 motions, this Court repeatedly explained that “[i]f the training had occurred and then nothing else,
 18 this case would not be here.” Tr. 23. The Court expressed “difficulty in understanding how the
 19 training aspect of this product injures anybody's rights,” noting that if any person could freely log
 20 onto GitHub to view code in public repositories, “why can't a software program do the same
 21 thing?” Tr. 27-28. And when the Court asked whether training alone could violate any
 22 attribution requirement in any applicable open-source license, Plaintiffs' counsel could only
 23 respond “Perhaps it doesn't.” Tr. 31.

24 Nevertheless, Plaintiffs now appear to predicate two claims for unjust enrichment (Count
 25 6) and Negligence (Count 8) on the act of training alone. These claims are highly dubious on the
 26 merits, as discussed below. But even if they were not, Plaintiffs still fail to allege any cognizable
 27 injury to them that would result from the mere training of a generative AI model based, in part, on
 28 code contained in Plaintiffs' repositories. Plaintiffs do not even try to allege how they have been

1 harmed by use of code in their public repositories to train a machine learning model. They do not
 2 identify a “concrete, particularized” invasion of a recognized legal interest that is violated merely
 3 by a software program viewing and learning from data that is publicly available on the internet.
 4 And Plaintiffs suggest no harm that would flow from the fact that an algorithm happens to exist
 5 that was in part trained on code Plaintiffs chose to make publicly available to anyone. Standing
 6 to seek damages for purposes of Counts 6 and 8 therefore cannot be predicated on training.

7 **B. All Requests For Or Assertions Of Entitlement To Monetary Relief Should Be**
 8 **Dismissed.**

9 Because Plaintiffs lack standing to seek damages, all requests for or assertions of
 10 entitlement to such relief should be dismissed from the case. This includes including Plaintiffs’
 11 allegations concerning a putative “Damages Class,” Am. Compl. at 9:13-16, which no named
 12 Plaintiff can represent. *See Hawkins v. Compartet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001)
 13 (“A named plaintiff cannot represent a class alleging … claims that the named plaintiff does not
 14 have standing to raise.”).

15 The Amended Complaint also includes prayers for punitive damages in connection with
 16 their interference with economic advantage, unjust enrichment, unfair competition, and
 17 negligence claims, which should independently be dismissed pursuant to Rule 12(b)(6). Under
 18 California law, punitive damages are available only upon a showing of “oppression, fraud, or
 19 malice,” which require some form of intentionally injurious, “despicable,” or intentionally
 20 misleading conduct. Cal. Civ. Code § 3294(a), (c); *see GBTI, Inc. v. Ins. Co. of Pa.*, No. CV F
 21 09-1173, 2009 WL 2365409, *6 (E.D. Cal. July 29, 2009) (collecting authorities on pleading
 22 requirements for punitive damages under § 3294). Plaintiffs include no non-conclusory
 23 allegations that GitHub or Microsoft engaged in the intentionally wrongful behavior required, so
 24 their punitive damages request should be dismissed under Rule 12(b)(6). *E.g., Rhynes v. Stryker*
 25 *Corp.*, No. 10-5619 SC, 2011 WL 2149095, *6 (N.D. Cal. May 31, 2011) (dismissing punitive
 26 damages request based only on “conclusory allegations”); *Vermillion v. Corrections Corp. of*
 27 *Am.*, No. CV F 08-1069, 2008 WL 4058063, *11 (E.D. Cal. Aug. 28, 2008) (similar).

28

1 **II. PLAINTIFFS' DMCA CLAIMS FAIL BECAUSE PLAINTIFFS DO NOT ALLEGE
2 REMOVAL OR ALTERATION OF CMI FROM IDENTICAL COPIES OF
3 WORKS.**

4 In resolving Defendants' previous motions to dismiss Plaintiffs' copyright management
5 information claims, this Court granted the motions as to § 1202(a) and (b)(2), but denied the
6 motions as to § 1202(b)(1) and (b)(3)—both of which involve removal or alteration of CMI.
7 Order 16, 18-21, ECF No. 95. Plaintiffs have not attempted to amend the dismissed claims,
8 repleading only their removal or alteration claims. Am. Compl. ¶¶ 183-213. GitHub and
9 Microsoft preserve all rights as to those claims, but do not seek to relitigate issues this Court has
10 already resolved. GitHub and Microsoft respectfully ask the Court to address a defect in
11 Plaintiffs' claims that it did not reach in its previous order, and one that is only more pronounced
12 in light of Plaintiffs' Amended Complaint: § 1202(b) claims lie only when CMI is removed or
13 altered from an identical copy of a copyrighted work. *See* Mots. To Dismiss 13-14, ECF No. 50
14 at 13-14 (Microsoft and GitHub's motions arguing that removal from an "identical copy of the
15 work" is required). Plaintiffs fail to plead this identical copy requirement as to any of their
16 claimed works.

17 Courts have consistently rejected § 1202(b) claims where the copy from which CMI is
18 allegedly removed is merely an excerpt or modification of the original copy. This includes
19 § 1202(b) claims based on mere "framing" of a photograph in a way that does not include CMI,
20 *id.*; excerpting lecture notes and study questions from textbooks without reproducing CMI,
21 *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1356, 1359 (N.D. Fla.
22 2010); copying "aspects" of architectural works but "omitting" the plaintiff's CMI, *Design*
23 *Basics, LLC v. WK Olson Architects, Inc.*, No. 17 C 7432, 2019 WL 527535, at *5 (N.D. Ill. Feb.
24 11, 2019); *Frost-Tsuji Architects v. Highway Inn, Inc.*, No. CIV. 13-00496, 2015 WL 263556, at
25 *3 (D. Haw. Jan. 21, 2015), *aff'd*, 700 F. App'x 674 (9th Cir. 2017); or incorporating the
26 underlying content from the original copy into some different form or distinct work without CMI,
27 *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999) (thumbnail versions of
28 images), *rev'd on other grounds*, 336 F.3d 811 (9th Cir. 2003).

1 This identical-copy requirement makes sense in light of the overarching purpose of

1 § 1202(b). That statute was enacted to create so-called paracopyright protections, “assist[ing] in
 2 tracking and monitoring uses of copyrighted works, as well as licensing of rights and indicating
 3 attribution, creation and ownership.” S. Rep. No. 105-190 (1998) at 16. That is why CMI is
 4 defined not as any information conveyed with any content, but specifically as “information
 5 conveyed in connection with copies … of a work.” 17 U.S.C. § 1202(c). Were it otherwise, what
 6 was intended as a narrow paracopyright protection would swallow copyright protection whole,
 7 allowing plaintiffs to plead “removal” of CMI from mere snippets of a work that may have no
 8 claim to any copyright protection at all.

9 Plaintiffs’ Amended Complaint lays this danger bare. In their initial Complaint, Plaintiffs
 10 were coy about what sort of code they were suggesting Copilot might emit without attribution in
 11 violation of § 1202(b). But the Amended Complaint’s examples show how broad—and legally
 12 untenable—their theory is. In the example pertaining to Doe 2, Plaintiffs caused Copilot to emit a
 13 list of the [REDACTED]
 14 [REDACTED]. Am. Compl. ¶¶ 100-04. Plaintiffs do not allege that this list of [REDACTED]
 15 constitutes a full, identical copy of a work in which they have an interest. Nor could they claim
 16 rights in it, since this “code” is merely a table of constants, which constants happen to be the
 17 [REDACTED] and which table happens to mirror the one contained in the Wikipedia
 18 article [REDACTED]
 19 [REDACTED]. See <http://en.wikipedia.org/wiki/> [REDACTED]. Yet
 20 Plaintiffs seem to be suggesting that if Doe 2 is not credited as the author of this obviously
 21 uncopyrightable code snippet, Defendants have violated § 1202(b).

22 This fundamental defect is endemic to Plaintiffs’ theory of § 1202(b) liability. As the
 23 Amended Complaint acknowledges, Copilot’s output is limited to short passages of code
 24 representing suggested completions for coding processes initiated by a user. *Supra* 4. Copilot’s
 25 output will therefore virtually never constitute an identical copy of a work. Moreover, the
 26 Amended Complaint acknowledges that suggested snippets are “more often” “modified or
 27 adapted”—that is, expressed with differences based on the patterns the model has internalized
 28 across the training set. Plaintiffs’ § 1202(b) theory would embrace *all of this*, ostensibly by

1 treating every output Copilot generates that *resembles* code in Plaintiffs' repository as a
 2 "Derivative Work" from which CMI has been removed.

3 That theory is wrong on the law. As the case law above demonstrates, § 1202(b) is about
 4 identical "copies ... of a work"—not about stray snippets and adaptations. And Plaintiffs' theory
 5 also cannot be squared with the Amended Complaint's own allegations about how Copilot
 6 actually works. Though Plaintiffs' brand Copilot a rote copy-paste machine that cannot
 7 understand code, their examples actually show that it does not *copy* anything, but rather generates
 8 suggestions afresh based on what it has discerned across a training set. (How else would it decide
 9 to use the terms [REDACTED])

10 [REDACTED] ? See Am. Compl. ¶ 103 (Plaintiffs acknowledging these
 11 variations on Copilot output.) This Court should dismiss the § 1202(b) claims because Plaintiffs
 12 have not alleged that Copilot removes CMI from identical copies of Plaintiffs' works.

13 **III. PLAINTIFFS' TORT CLAIMS ARE PREEMPTED BY THE COPYRIGHT ACT.**

14 Plaintiffs' state-law tort claims are all preempted by the Copyright Act because they are
 15 built on the allegation that Defendants, without authorization, copied, distributed, and created
 16 derivative works from code in Plaintiffs' repositories. This includes Plaintiffs' claims for tortious
 17 and negligent interference with economic advantage (Counts 4 and 5), unjust enrichment and
 18 negligence (Counts 6 and 8), and unfair competition to the extent based on state law tort claims
 19 (Count 7, Am. Compl. ¶ 276(c), (d)).

20 Section 301 of the Copyright Act preempts "legal or equitable rights that are equivalent to
 21 any of the exclusive rights within the general scope of copyright ... and come within the subject
 22 matter of copyright." 17 U.S.C. § 301(a). Courts evaluate copyright preemption under a "two-
 23 part test," holding state law claims preempted where (1) "the 'subject matter' of the state law
 24 claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103"; and
 25 (2) "the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106."
 26 *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017) (quotation marks omitted).

27 The subject matter requirement of the test is plainly satisfied. Plaintiffs' tort claims all
 28 involve Plaintiffs' claimed copyright interests in computer code, which constitutes a "literary

1 work” under § 102. *See Google*, 141 S. Ct. at 1196. These claims therefore involve the “subject
 2 matter” of copyright, a result that obtains even if the code is not actually protected by the
 3 Copyright Act. *See Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 979 (9th Cir. 2011)
 4 (en banc) (“[T]he scope of the subject matter of copyright law is broader than the protections it
 5 affords.”).

6 The equivalent-rights prong is also met with respect to each claim. When Defendants
 7 raised preemption in response to various claims in the initial Complaint, Plaintiffs did not even
 8 respond—doubtless because their claims quoted nearly verbatim from the Copyright Act’s list of
 9 exclusive rights. *See Order 17*, ECF No. 95 (“Plaintiffs’ opposition generally does not address
 10 Defendants’ preemption arguments.”). This Court recognized as much in finding Plaintiffs’
 11 unjust enrichment claim preempted: “Plaintiffs base their unjust enrichment claim on
 12 Defendants’ reproduction of Plaintiffs’ code as output and Defendants’ preparation of derivative
 13 works, both of which are rights protected under the Copyright Act.” *Id.* at 17-18. Although
 14 Plaintiffs replead their tort claims without using copyright language, the substance of the
 15 allegations shows that Plaintiffs’ tort claims remain mere copyright claims in disguise.

16 Plaintiffs’ interference with economic advantage claims are not based on any existing or
 17 specific economic opportunity. Plaintiffs claim that GitHub and Microsoft are interfering with
 18 their rights to form contracts with the “global open-source community” by “emitting code subject
 19 to open-source licenses without the licenses attached.” Am. Compl. ¶ 250. This claim at bottom
 20 is based on the theory that Plaintiffs have a tort-based exclusive right to control the reproduction
 21 and distribution of certain code to the general public, and that Defendants are interfering with
 22 those rights. That is a copyright claim. *See Crafty Prods., Inc. v. Fuqing Sanxing Crafts Co.*, 839
 23 F. App’x 95, 98-99 (9th Cir. 2020) (tortious interference claim preempted); *Harper & Row*
 24 *Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983) (tortious interference claim
 25 preempted where “unauthorized publication is the gravamen of the[] claim”), *rev’d on other*
 26 *grounds*, 471 U.S. 539 (1985).

27 It makes no difference that Plaintiffs also append the qualifier “without the licenses
 28 attached.” Am. Compl. ¶ 250. That is just another way of saying that Plaintiffs have not

1 authorized the reproduction or distribution of code in the manner they claim Defendants have
 2 engaged in. The claims are still, at bottom, based on reproduction and distribution—they are not
 3 qualitatively different merely because Plaintiffs also allege that the reproduction and distribution
 4 was unauthorized. Were it otherwise, a plaintiff could use state-tort law to dramatically curtail
 5 public domain rights the Copyright Act seeks uniformly to protect. As the Supreme Court has
 6 explained, absent copyright protection, “the public may use the … work at will and without
 7 attribution.” *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003).
 8 Plaintiffs’ rights to control reproduction and distribution to the “global … community” therefore
 9 lie in the Copyright Act or perhaps contract—but they cannot be derived from state tort-law.

10 Plaintiffs’ unjust enrichment and negligence claims, meanwhile, are based on the
 11 exclusive right “to prepare derivative works.” 17 U.S.C. § 106. Both claims appear to target the
 12 training of Codex and Copilot. Am. Compl. ¶ 269 (“Defendants have unjustly utilized access to
 13 Licensed Materials hosted on GitHub to create Codex and Copilot.”); *id.* ¶ 271 (“Plaintiffs did not
 14 consent to the unauthorized use of their Licensed Materials to train Codex and Copilot.”); *id.*
 15 ¶ 284 (“Defendants breached their duties by … engineering, designing, maintaining, and
 16 controlling systems—including Codex and Copilot—which are trained on Plaintiffs’ and Class
 17 members’ Licensed materials without their authorization.”). Plaintiffs explicitly allege,
 18 moreover, that Copilot is a derivative work: “The definition [of Derivative Works] also includes
 19 the Copilot product itself, which is a Derivative Work based upon a large corpus of Licensed
 20 Materials.” Am. Compl. ¶ 194 n.34. So, by the terms of Plaintiffs’ own allegations, the conduct
 21 underlying their unjust enrichment and negligence claims is the preparation of a derivative work.
 22 It is therefore preempted. *See* Order 17, ECF No. 95 (finding preemption of unjust enrichment
 23 claim based upon preparation of a derivative work).

24 Lastly, insofar as Plaintiffs’ UCL claim is predicated on the above state-law torts, it too is
 25 preempted. *See* *Maloney*, 853 F.3d at 1019 (holding UCL claim preempted); *Kodadek v. MTV*
 26 *Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1998) (same).

27
 28

1 **IV. THE TORT CLAIMS ARE DEFECTIVE FOR OTHER REASONS AS WELL.**

2 **A. Plaintiffs Fail To Identify Applicable State Law For Their Common Law**

3 **Claims.**

4 In its order on Defendants' motions to dismiss the initial Complaint, this Court noted

5 Plaintiffs' failure to "identify the state law which applies to each" of its common law tort claims

6 and directed Plaintiffs "in any future amended complaint ... [to] identify the state under whose

7 law the claim is brought." Order 4 n.5, ECF No. 95. Plaintiffs have failed to comply with this

8 Court's directive with respect to their common law tort claims for intentional interference with

9 prospective economic relations, negligent interference with prospective economic relations,

10 unjust enrichment, unfair competition, and negligence. This is "grounds for dismissal." *Id.*

11 (quoting *In re Nexus 6P Prods. Liab. Litig.*, 293 F. Supp. 3d 888, 933 (N.D. Cal. 2018) (quotation

12 marks omitted)).

13 **B. Plaintiffs Fail To State A Claim For Intentional Or Negligent Interference**

14 **With Economic Relations.**

15 Plaintiffs do not replead their original tortious interference with contractual relations

16 claim. Instead, they replace it with claims for intentional and negligent interference with

17 prospective economic relations (Counts 4 and 5). Although "[t]ortious interference with

18 prospective economic advantage ... does not depend on the existence of a legally binding

19 contract," it still requires a plaintiff to show that the defendant interfered with a specific

20 "economic relationship between the plaintiff and some third party, which carries the probability

21 of future economic benefit to the plaintiff." *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130,

22 1141 (2020) (alterations adopted). For both claims, Plaintiffs must identify specific, known

23 relationships and plausibly allege the probability of concrete future economic benefit from the

24 identified relationship. *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507,

25 523-28 (1996); *Rosen v. Uber Techs., Inc.*, 164 F. Supp. 3d 1165, 1178-79 (N.D. Cal. 2016). The

26 only "difference between intentional interference and negligent interference with prospective

27 economic advantage relates to the defendant's intent." *Crown Imports, LLC v. Super. Ct.*, 223

28 Cal. App. 4th 1395, 1404 n.10 (2014).

29 Here, the Amended Complaint does not identify any specific business expectancy or third-

1 party relationship with which GitHub and Microsoft allegedly interfered. The Amended
 2 Complaint merely alleges that Defendants affected Plaintiffs' relationships with the "global open-
 3 source community" and interfered with Plaintiffs' vague expectation that unidentified
 4 "programmers would use, modify, copy or otherwise iterate on their posted code subject to the
 5 terms of the open-source licenses the code was published subject to." Am. Compl. ¶¶ 247, 258,
 6 260. It is well-settled, however, that a plaintiff cannot base an economic interference claim on
 7 abstract interference with opportunity in "the market" generally or on vague "lost
 8 opportunit[ies]." *Westside Ctr. Assocs.*, 42 Cal. App. 4th at 527. Instead, Plaintiffs must identify
 9 specific relationships with specific third-parties and plausibly allege that defendant "knew of the
 10 existence of the relationship." *Id.* at 526; *see O'Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989,
 11 998 (N.D. Cal. 2014) ("[I]nterference with potential" third parties "with whom the plaintiff did
 12 not have an existing relationship generally is not sufficient to state a claim.") Allowing the claim
 13 to proceed based on Plaintiffs' allegation that "programmers" generally would use open-source
 14 code differently absent Defendants' actions would "allow[] recovery no matter how speculative
 15 the plaintiff's expectancy." *Rosen*, 164 F. Supp. 3d at 1179.

16 Nor do Plaintiffs plausibly allege that these unspecified relations in fact carried the
 17 likelihood of generating "future economic benefit." *Ixchel*, 9 Cal. 5th at 1141. Plaintiffs vaguely
 18 allege that Defendants caused them to miss out on "substantial benefits" that come with "the
 19 creation and distribution of open-source code subject to these open-source licenses," Am. Compl.
 20 ¶ 243; "prevented Copilot users from becoming part of the user communities that would
 21 ordinarily accrete around the open-source projects of Plaintiffs and the Class," Am. Compl.
 22 ¶ 249; and prevented them from "optimiz[ing] the likelihood of accruing communities of other
 23 GitHub customers for their own projects," Am. Compl. ¶ 256. But the Amended Complaint does
 24 not allege how actual "future economic benefits" would have flown to Plaintiffs from their
 25 "becoming part of the user communities" or engaging in "open-source distribution" in the
 26 absence of Defendants' challenged conduct. Instead, it "assumes what normally must be proved,
 27 i.e., that it is reasonably probable the plaintiff would have received" a concrete "expected benefit
 28 had it not been for the defendant's interference." *Rosen*, 164 F. Supp. 3d at 1179. The Amended

1 Complaint's assertions that Defendants "deprive[d] Plaintiffs of the economic benefits of open-
 2 source distribution," Am. Compl. ¶ 262, and "the future economic benefits likely to arise from
 3 those relationships," Am. Compl. ¶ 246, are thus paradigmatic conclusory allegations that fail to
 4 state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

5 The Amended Complaint also fails to plausibly allege "actual disruption" or specific
 6 "harm," two additional elements of the claims. *Korea Supply Co. v. Lockheed Martin Corp.*, 29
 7 Cal. 4th 1134, 1153 (2003). As a result, the Amended Complaint does not state a claim for any
 8 economic interference tort.

9 **C. Plaintiffs' New Attempt At An Unjust Enrichment Claim Does Not Cure Its**
 10 **Defects.**

11 Under California law, the only form of independent claim sounding in unjust enrichment
 12 is "a quasi-contract claim seeking restitution." *ESG Cap. Partners, LP v. Stratos*, 828 F.3d 1023,
 13 1038 (9th Cir. 2016) (citation omitted). "However, 'to allege a quasi-contract claim, a party must
 14 plausibly allege the absence of any applicable and enforceable contract provisions, even if in the
 15 alternative.'" *In re Bang Energy Drink Mktg. Litig.*, No. 18-cv-05758, 2020 WL 4458916, at *10
 16 (N.D. Cal. Feb. 6, 2020) (quoting *City of L.A. v. Sprint Sols., Inc.*, No. 17-cv-00811, 2019 WL
 17 5568879, at *9 (E.D. Cal. Oct. 29, 2019)). But Plaintiffs have not anywhere "alternatively
 18 alleged the absence of such provisions," *id.*, so this claim should be dismissed for that reason
 19 alone.

20 The claim additionally fails for the reason that Plaintiffs have not alleged how Defendants
 21 benefited at their expense. *See Stratos*, 828 F.3d at 1038 ("To allege unjust enrichment as an
 22 independent cause of action, a plaintiff must show that the defendant received and unjustly
 23 retained a benefit at the plaintiff's expense."). Plaintiffs say that "[b]y using Plaintiffs' Licensed
 24 Materials to train Codex and Copilot, Plaintiffs and the Class were deprived of the benefits of
 25 their open-source licenses, including monetary damages." Am. Compl. ¶ 270. But Plaintiffs
 26 have not alleged any injury based on training. *See also* Order at 8 n.7, ECF No. 95 ("Plaintiffs
 27 do not allege they were injured by Defendants' use of licensed code as training data[.]"). Even
 28 construed as a claim based on output, the unjust enrichment claim fails because Plaintiffs have

1 not alleged that any Copilot user other than themselves has ever prompted Copilot to suggest code
 2 that is a copy of theirs. *See supra* 9-10.

3 **D. Plaintiffs Have Not Alleged The Deprivation Of Money Or Property Required**
 4 **To Make A UCL Claim.**

5 Plaintiffs duplicate their DMCA, open-source license, and tort claims as purported
 6 violations by GitHub of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200,
 7 *et seq.* (Count 7). This is dead on arrival. The “UCL’s standing requirements” are “more
 8 stringent than the federal standing requirements” and require a showing of “lost money or
 9 property.” *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 324 (2011); Cal. Bus. & Prof. Code
 10 § 17204.

11 The Amended Complaint does not plausibly allege the required “lost money or property.”
 12 Cal. Bus. & Prof. Code § 17204. It asserts that “Plaintiffs and the Class have suffered economic
 13 injury as a result of Defendants’ conduct.” Am. Compl. ¶ 281. But the Amended Complaint does
 14 not allege any factual theory of *how* Plaintiffs suffered monetary loss as a result of the training of
 15 Copilot or its suggestions, let alone any specific allegations supporting such a theory. All they
 16 state is that “there are economic benefits to the creation of open-source works such as generating
 17 market share for programs, increasing national or international reputation by incubating open-
 18 source projects, and deriving value from improvements to software based on suggestions by end-
 19 users.” Am. Compl. ¶ 281. This general observation provides no explanation of how
 20 Defendants’ conduct caused them to lose “money or property.” Plaintiffs therefore offer only a
 21 “[t]hreadbare recital[]” of the UCL’s “stringent” standing element “devoid of ‘further factual
 22 enhancement,’” which “do[es] not suffice.” *Iqbal*, 556 U.S. at 678 (citation omitted).

23 **E. Plaintiffs’ Negligence Claim Fails To Identify Any Legal Duty Sounding In**
 24 **Tort.**

25 Plaintiffs’ negligence claim should be dismissed for lack of plausible allegations of duty
 26 and injury. “The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to
 27 establishing a claim for negligence.” *Langan v. United Servs. Auto. Ass’n*, 69 F. Supp. 3d 965,
 28 987 (N.D. Cal. 2014) (quoting *Nymark v. Heart Fed. Savings & Loan Ass’n*, 231 Cal.App.3d

1 1089, 1095 (1991)). Plaintiffs allege “Microsoft and GitHub also owed its user a duty of care not
 2 to itself use the Licensed Materials in a way that would foreseeably cause Plaintiffs and Class
 3 members injury, for instance, by using Licensed Materials to train Copilot.” Am. Compl. ¶ 286.
 4 This apparent duty is grounded in “Defendants’ relationship” to Plaintiffs, including “Defendants’
 5 contractual obligations, custom and practice, right to control information in its possession,
 6 exercise of control over the information in its possession, authority to control the information in
 7 its possession, and the commission of affirmative acts that resulted in said harms and losses.”
 8 Am. Compl. ¶ 283. But *all of* these ostensible sources of duty are in fact grounded in the
 9 “contractual obligations” (and rights) that define the terms of users’ relationship with GitHub.
 10 And that forecloses any tort-based duty, because it is settled California law that a duty in tort
 11 cannot be derived from obligations in a contract absent some “special relationship” recognized in
 12 law—which Plaintiffs do not and cannot claim here. *See Foley v. Interactive Data Corp.*, 47 Cal.
 13 3d 654, 682-94 (1988).

14 Moreover, any alleged violation of duty predicated on *training* Copilot with code
 15 published in public GitHub repositories, it is expressly *foreclosed* by GitHub’s Terms of Service.
 16 Am. Compl. Ex. 1. GitHub’s TOS expressly authorizes the training of Copilot. The TOS
 17 informs users that “You own content you create, but you allow us certain rights to it.” Am.
 18 Compl. Ex. 1 at 27 (TOS at 6). “These license grants apply to Your Content” when uploaded to
 19 GitHub, notwithstanding any other license terms that might be attached. *Id.* Every GitHub user
 20 chooses whether to allow their “repositories to be viewed publicly.” *Id.* No user is required to
 21 make a repository public. If they choose to do so, they “grant [GitHub] … the right to store,
 22 archive, parse, and display” publicly posted content and “make incidental copies, as necessary to
 23 provide the Service, including improving the Service over time.” *Id.* This includes the right to
 24 “copy” public material “to our database,” “parse it into a search index or otherwise analyze it on
 25 our servers,” and “share it with other users.” *Id.* at 27-28 (TOS at 6-7). The “Service” includes
 26 all “the applications, software, products, and services provided by GitHub,” *id.* at 24 (TOS at 3),
 27 which includes Copilot. *See* Am. Compl. ¶ 8; Am. Compl. Ex. 1 at 23, 37 (TOS at 3, GitHub
 28 Copilot Terms).

1 As Plaintiffs allege, Copilot functions by evaluating the code contained in GitHub’s public
2 repositories, Am. Compl. ¶¶ 86-87, in order to “infer[] statistical patterns governing the structure
3 of code.” Am. Compl. ¶ 56. That activity is squarely encompassed by the contractual
4 authorization, from every public code repository owner, for GitHub to “store, archive, parse, and
5 display” publicly posted content “as necessary to provide … the applications, software, products,
6 and services provided by GitHub” and to “analyze it on our servers.” Am. Compl. Ex. 1 at 26-27,
7 23 (TOS at 6-7, 3). Even if the Amended Complaint put forward any plausible theory of how
8 inspection and analysis of publicly posted material violated an open source license provision,
9 Plaintiffs’ acceptance of the GitHub TOS forecloses a claim for breach of contract based on
10 Copilot’s training on the public code. “Dismissal is … proper where the complaint alleges facts
11 that demonstrate that the [claim] is barred as a matter of law.” *Orchard Supply Hardware LLC v.*
12 *Home Depot USA, Inc.*, 967 F. Supp. 2d 1347, 1354 (N.D. Cal. 2013). So it is here.

13 Plaintiffs also fail to allege any injury. Plaintiffs assert Defendants' "breach of their
14 duties," "by using open-source code in violation of open-source licenses to train Codex and
15 Copilot," "proximately caused Plaintiffs and Class members injuries," Am. Compl. ¶¶ 287-88,
16 but they do "not allege *how*" they were "injured by such conduct nor what damages [Plaintiffs]
17 sustained from such conduct." *West v. City & Cnty. of S.F.*, No. 21-cv-02370, 2022 WL
18 1556415, at *13 (N.D. Cal. May 17, 2022) (emphasis added). Count 8 should be dismissed.

CONCLUSION

20 The Court should grant the motions to dismiss portions of the Amended Complaint.

22 | Dated: June 29, 2023

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